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In the Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORPORATION, *Petitioner*
v.
ALLIANCE RESOURCES CORPORATION, TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE, *Respondents*

On Writ of Certiorari to the Supreme Court of West Virginia

BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION, THE ASSOCIATION FOR CALIFORNIA TORT REFORM, THE ALABAMA CIVIL JUSTICE REFORM COMMITTEE, THE MINNESOTA CIVIL JUSTICE COALITION AND THE TEXAS CIVIL JUSTICE LEAGUE AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

This brief will address the following question:

Whether the punitive damages award in this case violates the requirements of substantive due process because it exceeds any amount that is rationally related to the purposes of punishment and deterrence.

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INTEREST OF THE AMICI CURIAE

The American Tort Reform Association ("ATRA"), which was founded in 1985, is a broad-based, bipartisan coalition of more than 400 businesses, corporations, municipalities, associations, professional firms and public interest and consumer groups who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The Association for California Tort Reform ("ACTR") is dedicated to educating the public about ways to improve California's civil liability system in terms of fairness, efficiency, economy,

uniformity, and certainty. Founded 15 years ago as a non-profit corporation, ACTR presently has close to one thousand members representing business, the professions, local government and individual citizens.

The Alabama Civil Justice Reform Committee is an association of Alabama business and professional organizations who are concerned with the current state of the civil justice system.

The Texas Civil Justice League, created in 1986, is a 2300 member organization of individuals, municipalities, associations and corporations in Texas who are seeking reform of the civil justice system.

The Minnesota Civil Justice Coalition is comprised of business associations, professional groups, governmental associations and individual companies who believe that significant reform of the civil justice system is needed.[1]

SUMMARY OF ARGUMENT

The principles that govern the excessiveness issue should not be in dispute. For a century it has been clear that the Due Process Clause imposes substantive limits on the size of civil penalties in litigation between private parties. The applicability of those constraints to punitive damages was made clear in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1046 (1991), where the Court stated that punitive awards may not be "greater than reasonably necessary to punish and deter." That standard takes its content from the primary substantive guarantee of the Due Process Clause: protection against actions of government that are irrational or inconsistent with the basic values that underlie our society.

The imposition of punitive damages in an amount that bears no reasonable relationship to the nature and magnitude of the defendant's misconduct accordingly cannot stand; whether viewed in terms of retribution or of deterrence, it is a fundamental tenet of

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

our system that a greater wrong should be punished more severely than a lesser one. Several factors are relevant in considering the allowable severity of punishment: the character of the defendant's conduct, the gravity of the harm caused by that conduct, the anticipated or actual gain to the defendant, and the sanctions for analogous conduct set forth in civil and criminal statutes. On the other hand, the financial condition of a corporate defendant -- which has little bearing either on culpability or on the sanction needed to deter -- is of distinctly limited relevance. And in any case, the jury's verdict, when made without the guidance provided by a legislatively established punishment range, is due only modest deference.

Application of these principles to this case makes clear that the punitive verdict was so excessive as to be unconstitutional. TXO's conduct, which constituted an obscure tort that was not established in West Virginia law until the decision in this case, was hardly a grave offense. TXO obtained no gain from its actions. The harm suffered by respondents was minimal. The jury was exposed to, and surely was influenced by, evidence of TXO's net worth. And the punitive award was vastly greater than the statutory penalties in West Virginia and other jurisdictions for more serious misconduct than that engaged in by TXO. In these circumstances, nothing justifies a punitive award that is more than 500 times greater than the compensatory recovery.

In saying this, we appreciate that there is a natural judicial reluctance to apply substantive constitutional limits in a manner that restricts specific punishments. But the Court has done so in the past under both the Due Process Clause and Eighth Amendment, and judges regularly engage in line-drawing with respect to allegedly excessive verdicts in the remittitur context. It therefore is both necessary and appropriate for the Court to address the problem of excessive punishment that this and similar cases present.

ARGUMENT

THE PUNITIVE DAMAGES IN THIS CASE VIOLATE DUE PROCESS BECAUSE THEY ARE NOT RATIONALLY RELATED TO THE GOALS OF PUNISHMENT AND DETERRENCE

The award of punitive damages at issue in this case is, in many ways, astounding. Even granting the correctness of the lower court's factual findings, this case involves nothing more than a run-of-the-mill business tort: TXO filed an assertedly frivolous quitclaim deed and then brought an insubstantial quiet title action to use as leverage in negotiating a more favorable royalty agreement with respondents. See Pet. App. 17a-20a. This wrongful act did not cause -- or threaten to cause -- physical injury to persons or property; it did not pose a risk of harm (physical or economic) to the public at large; it did not involve criminal conduct of any kind. Indeed, the only out-of-pocket "loss" inflicted upon respondents was the $19,000 they paid in attorney's fees to defend the quiet title suit and to launch their own counterclaim. But the jury nevertheless awarded, and the court below affirmed, a punitive judgment of $10 million, an amount more than 500 times greater than the actual injury that respondents suffered.

While such a $10 million "private fine" (as the Court has termed punitive damages, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) for an unexceptional tort that caused only minimal harm seems remarkable, there is one respect in which it is not extraordinary: as the size of punitive damage awards has grown exponentially in recent years, more and more of them -- like the judgment in this case -- have borne no discernible relationship to the gravity of the defendant's misconduct. See generally, *e.g.*, P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 127 (1988); M. Peterson, *et al.*, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 65 (1987). In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), the Court accordingly noted its "concern about punitive damages that 'run wild.'" But the constraints on the discretion of juries and reviewing courts that were recognized in *Haslip* have not abated the flow of "staggering" judgments. *Id.* at 1066 (O'Connor, J., dissenting). Even a cursory review reveals that, in the less than two

years since *Haslip* was decided, dozens of seven- and eight-figure punitive awards have survived at least one level of judicial review.[2] It may well be that some of those awards were justified, of course, but the continuing upward spiral has begun to produce results that, as the Court has put it, "jar one's constitutional sensibilities." *Id.* at 1043.

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[2] See, *e.g.*, *The Narrows, L & L Enters.* v. *Gotham Ins. Co.*, No. 3AN-89-09272 (Alaska Super. Ct. 1991) ($60 million punitive; $1 million compensatory); *Proctor* v. *Upjohn Corp.*, No. 84 L 3213 (Ill. Circuit Ct. Sept. 3, 1992) ($35 million punitive after remittitur; $3 million compensatory), app. pending; *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991) ($28 million punitive after remittitur; $390,000 compensatory); *Sheridan* v. *Northwestern Mut. Life Ins. Co.*, No. CV-89-2505-PR (Ala. Circuit Ct. Apr. 10, 1992), app. pending, No. 1911110 ($26 million punitive; $800,000 compensatory); *Polar Equip.* v. *Brunswick Corp.*, No. 3AN873826 CV (Alaska Super, Ct. 1991) ($25.3 million punitive; $9.47 million compensatory) (case settled while on appeal); *Dunn* v. *Owens-Corning Fiberglass*, 774 F. Supp. 929 (D.V.I. 1991) ($25 million punitive; $1.3 million compensatory), aff'd in part and vacated in part, 1992 U.S. App. LEXIS 22749 (3d Cir. 1992) (damages not disturbed); *General Chem. Corp.* v. *De La Lastra*, 815 S.W.2d 750 (Tex. Ct. App. 1991) ($15 million punitive; $6.5 million compensatory); *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($12.5 million punitive after remittitur; $9.025 million compensatory), cert. denied, 112 S. Ct. 1941 (1992); *Braswell* v. *ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991) ($9.1 million punitive; $4.5 million compensatory); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 779 F. Supp. 994 (W.D. Ark. 1991) ($8 million punitive; $750,000 compensatory), aff'd, 979 F.2d 1301 (8th Cir. 1992); *General Motors Corp.* v. *Johnston*, 592 So.2d 1054 (Ala. 1992) ($7.5 million punitive after remittitur; $75,000 compensatory); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ($6.1 million punitive; $2.59 million compensatory), cert. denied, 112 S. Ct. 1778 (1992); *Hughes* v. *Consol-Pa. Coal Co.*, 945 F.2d 594 (3d Cir. 1991) ($5.5 million punitive; $5.36 million compensatory), cert. denied, 112 S. Ct. 2300 (1992); *Banco do Brasil, S.A.* v. *Latian, Inc.*, 285 Cal. Rptr. 870 (Cal. Ct. App. 1991) ($5 million punitive after remittitur; $5.5 million compensatory); *Defender Indus., Inc.* v. *Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) ($5 million punitive; $106,514 compensatory); *Borden, Inc.* v. *De La Rosa*, 825 S.W.2d 710 (Tex. Ct. App. 1991) ($1.5 million punitive; $553,288 compensatory).

Those awards, moreover, have done more than impose arbitrary and excessive sanctions on particular defendants. By setting punishments that are entirely out of line with the threatened harms, they have deterred socially beneficial behavior and led to grotesque misallocations of resources. See generally II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 234 (1991); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 858-860 (1989). It thus is well-documented that the threat of excessive punitive liability has led to the discontinuance of products and the termination of useful research in fields such as pharmaceuticals and general aviation, among others. See *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282-283 (1989) (O'Connor, J., concurring in part and dissenting in part); P. Huber & R. Litan, eds., THE LIABILITY MAZE (1991).

In its challenge to one such excessive award, TXO demonstrates that the procedures used below were constitutionally inadequate, and we fully subscribe to its analysis on that score. Our focus, however, is on the other issue it presents: whether TXO was denied the *substantive* rights guaranteed it by the Due Process Clause because the punishment in this case is wholly disproportionate to the company's wrongful conduct and does not rationally advance the purposes for which punitive damages are exacted. We urge the Court to reach this issue even if it finds that flawed procedures were used below. Procedural reform alone is not a complete answer to the problem of constitutionally excessive punitive damages;[3] by devoting attention to the substantive side of the issue now, the Court could pretermit what otherwise is sure to be voluminous and unnecessary litigation.

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[3] As the brief for amicus Business Council of Alabama demonstrates, the procedural regime in Alabama, which was cited by the Court in *Haslip* as an acceptable model, has not prevented the entry of excessive punitive judgments.

A. THE DUE PROCESS CLAUSE PROHIBITS DISPROPORTIONATE AND IRRATIONAL PUNITIVE EXACTIONS

1. Punitive Damages That Are Arbitrary And Irrational In Amount Deprive The Defendant Of Property Without Due Process

The principles that govern the excessiveness issue should not be in dispute. For a century it has been clear that the Due Process Clause imposes substantive limits on the size of civil penalties in litigation between private parties. See *Browning-Ferris*, 492 U.S. at 276; *id.* at 280-281 (Brennan, J., concurring); *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915); *Missouri Pac. Ry.* v. *Tucker*, 230 U.S. 340, 351 (1913); *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909); *Missouri Pac. Ry.* v. *Humes*, 115 U.S. 512, 523 (1885). That principle has been used to invalidate statutory penalties that are "grossly out of proportion to the possible actual damages" and thus "so arbitrary and oppressive that [their] enforcement would be [unconstitutional]." *Tucker*, 230 U.S. at 351.

Haslip made clear that similar constraints apply to the imposition of punitive damages. In drawing the line between the "constitutionally acceptable and the constitutionally unacceptable," the Court explained that punitive judgments must be governed by "general concerns of reasonableness." 111 S. Ct. at 1043. In fact, the Court held Alabama's procedures for the award of punitive damages constitutionally adequate because it believed that the Alabama courts, by measuring the size of the award against the culpability of the defendant, the harm caused by the defendant's conduct, the profitability of that conduct, and similar factors, "ensure[] that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 1045; see *id.* at 1044. Implicit in that procedural holding is the substantive requirement that "a particular award [cannot be] greater than reasonably necessary to punish and deter" (*id.* at 1046); otherwise, the particular nature of Alabama's judicial review and the considerations taken into account by its courts would have been beside

the point. Indeed, the Court in *Haslip* concluded its opinion by itself conducting a constitutional excessiveness review and finding, "after careful consideration," that the judgment did "not cross the line into the area of constitutional impropriety." *Ibid.* (footnote omitted).

The crucial question here, then, is not whether the Due Process Clause imposes substantive limits on the size of punitive damage awards; that point has been settled. Instead, the central question for the Court is how to determine whether a given award exceeds those limits.

2. A Punitive Award Is Arbitrary And Irrational When It Is Disconnected From The Factors That Have Been Understood To Justify Punishment

The appropriate standard for the substantive due process inquiry was stated many years ago in cases like *Missouri Pac. Ry. v. Tucker* and was restated in *Haslip*: it involves determining whether the punitive exaction is "greater than reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. at 1046. But stating the standard is easier than applying it. When does the size of the punishment exceed that "necessary to punish and deter"? The question threatens to become circular. The answer, after all, necessarily turns on the degree of deterrence and retribution thought appropriate. If it were reasonable to seek absolute deterrence and limitless retribution, no amount of punishment would be more than is "reasonably necessary," since increasing the punitive award simply increases the level of retribution and deterrence achieved by the award's imposition. Yet implicit in the concept of "reasonable necessity" is the understanding that punishments -- which when high enough deter far more legitimate than illegitimate conduct -- become constitutionally *unreasonable* when they reach a certain level. Unfortunately, it is difficult, without some external point of reference, to say that the amount of deterrence and retribution accomplished by any particular award has reached that point.

Failure to seek such a point of reference, however, leads to a complete abdication of the judicial responsibility to assure that state action is compatible with the Due Process Clause. It would mean, to adapt a familiar example that the Court has used in a closely related setting, that a jury could return a punitive award of $1

million (or $10 million, or $100 million) against a corporation whose employee was guilty of overtime parking in the plaintiff's parking lot. Cf. *Solem* v. *Helm*, 463 U.S. 277, 311 n.3 (1983) (Burger, C.J., dissenting); *Hutto* v. *Davis*, 454 U.S. 370, 374 n.3 (1982); *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980). Or if the defendant in such a suit were an individual rather than a corporation, the jury could transfer to the plaintiff the defendant's house and all of his possessions as a penalty for overtime parking. Could such a punishment really be rational? As Justice Powell has noted, while a penalty of that magnitude "might well deter vehicular lawlessness, * * * it would offend our felt sense of justice." *Rummel*, 445 U.S. at 288 (dissenting opinion).

The prospect of enormous awards for trivial offenses, however, is not wholly hypothetical. Whatever the likelihood that a legislature would depart so far from rationality in setting sanctions (compare *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2696-2697 (1991) (opinion of Scalia, J.), with *id.* at 2714 (White, J., dissenting)), there can be no comparable confidence that individual juries, which have no experience with use of the legal system to administer punishments, will be constrained by the "general concerns of reasonableness" found controlling in *Haslip*.[4] The remarkable judgment returned in this case seems to prove the point. Yet allowing such judgments to stand on the theory that rationality or reasonableness necessarily is in the eye of the beholder would

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[4] Jury awards are, of course, subject to judicial review. But common law review of punitive judgments is conducted under a highly deferential standard. In Alabama (which has become a post-*Haslip* model for other States), for example, the law establishes a "presumption of correctness of the jury verdict." *Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So.2d 414, 421 (Ala. 1991). Indeed, the Alabama Supreme Court -- acting four days after this Court handed down its decision in *Haslip* -- held invalid under the state constitution a provision of Alabama's tort reform statute that would have eliminated the presumption of correctness for purposes of post-trial and appellate review. See *id.* at 415, 421. Meanwhile, the upward spiral of awards has a ratchet effect for purposes of review, as reviewing courts find record awards justified by reference to other recent high awards. Cf. *Browning-Ferris*, 492 U.S. at 278-279 n.24.

mean that there is no protection for the hapless defendant who loses all of his possessions over some minor misdeed.

Of course, as the Court noted in *Haslip*, drawing a line between "the constitutionally acceptable and the constitutionally unacceptable" may often be a difficult matter that requires close analysis of the facts of particular cases. 111 S. Ct. at 1043. But the Court has found similar inquiries manageable in the closely related settings of the Eighth Amendment's Cruel and Unusual Punishments and Excessive Bail Clauses. See *Harmelin*, 111 S. Ct. at 2702-2703 (opinion of Kennedy, J.), citing, *e.g.*, *Solem* v. *Helm*, *supra*; *Enmund* v. *Florida*, 458 U.S. 782 (1982); *Coker* v. *Georgia*, 433 U.S. 584 (1977); and *Weems* v. *United States*, 217 U.S. 349 (1910) (proportionality review under the Cruel and Unusual Punishments Clause); *United States* v. *Salerno*, 481 U.S. 739, 754 (1987) (Excessive Bail Clause); *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951) (same). The Court also has found it within the judicial competence to determine whether legislation advances the statutory purposes sufficiently to be judged rational under the Due Process and Equal Protection Clauses.[5] And courts historically have engaged in similar inquiries (albeit outside the constitutional context) when ordering common law remittiturs. In these and many other areas, the Court, despite the difficulty of the judgments involved, has found it "necessary to draw a line." *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968). See *Solem*, 463 U.S. at 294. Drawing such a line also is appropriate here.

In our view, the analysis in this case should be built on the principle that undergirds *Haslip*: the understanding that the

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[5] The Court has not hesitated to invalidate enactments found irrational under either Clause. See, *e.g.*, *Railroad Retirement Board* v. *Alton R. R.*, 295 U.S. 330, 350 (1935) (due process); *id.* at 389 (Hughes, C.J., joined by Brandeis, Stone, and Cardozo, JJ., dissenting) (agreeing that statutory provision is "arbitrary and beyond the power of Congress"); *Allegheny Pittsburgh Coal Co.* v. *Webster County Comm'n*, 488 U.S. 336 (1989) (equal protection); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 440 (1982) (opinion of Blackmun, J.) (same); *id.* at 443 (Powell, J., concurring in the judgment) (same); *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (same); *Lindsey* v. *Normet*, 405 U.S. 56, 78 (1972) (same).

primary substantive guarantee of the Due Process Clause is protection "'against arbitrary action of government.'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Clause thus gives force to "'the basic values that underlie our society'" (*Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-123 (1989) (plurality opinion), quoting *Griswold* v *Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment)), invalidating government actions that are "oppressive and 'violate the rudiments of fair play.'" *Chicago & N.W. Ry.* v. *Nye Schneider Fowler Co.*, 260 U.S. 35, 44 (1922). Measured against this standard, a punitive exaction must be deemed fundamentally unfair when it is disconnected from those factors -- such as the gravity of the injuries caused by the offense, the reprehensibility of the defendant's conduct, and the relationship of the sanction to the need to discourage future misconduct -- that historically have been understood to justify punishment. And a punitive judgment plainly is irrational when it greatly exceeds the penalties thought appropriate in all analogous settings. With this in mind, we briefly sketch the factors that should be considered in determining whether punitive damages are so disproportionate to the defendant's misconduct as to violate due process.

B. PUNITIVE DAMAGES ARE DISPROPORTIONATE AND IRRATIONAL IF THEIR AMOUNT BEARS NO REASONABLE RELATIONSHIP TO THE NATURE AND GRAVITY OF THE DEFENDANT'S CONDUCT

In assessing the propriety of punishment, one consideration was given prominent treatment in *Haslip* (see 111 S. Ct. at 1045-1046) and has been deemed dispositive by a plurality of the Court in the closely related context of the Cruel and Unusual Punishments Clause: the relationship between the sanction and the gravity of the defendant's misconduct. See *Harmelin*, 111 S. Ct. at 2705-2707 (opinion of Kennedy, J.). The reason for this is plain. Any rational system of deterrence must take account of the gain to the wrongdoer and the loss to society attributable to the wrongful act. And so far as just retribution is concerned, "it is a precept of justice that punishment * * * should be graduated and proportioned to offense." *Weems*, 217 U.S. at 367. See *Solem*,

463 U.S. at 284 ("[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"). This fundamental tenet has been recognized in Anglo-American law at least since the time of Magna Carta (see note 10, *infra)* and rests on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952).[6]

There are several established guideposts that are useful in measuring the gravity of an offense for the purpose of assessing the appropriate punishment. This Court's decisions applying the Eighth Amendment and substantive due process are helpful, as are common law standards developed to resolve excessiveness challenges to punitive damages awards. These sources suggest that a punitive exaction is disproportionate to the offense when it lacks any reasonable relationship to the *character* of the defendant's misdeeds, to the *injury* caused by the defendant's action, or to the actual or potential *gain* to the defendant. While all of these considerations will not be applicable or of equal weight in every instance, the excessiveness of an exaction in relation to any of these benchmarks is strongly suggestive of constitutional infirmity.

1. The Character Of The Defendant's Conduct

In analyzing the character of the defendant's conduct, an initial consideration is the "severity" of the wrong. See generally RESTATEMENT (SECOND) OF TORTS § 908(2) (the punishment must bear some relation to the "character of the defendant's act"). There is, for example, a societal consensus that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S. at 292-293. Similarly, offenses threatening "'the health and welfare of our population'" fall on the

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[6] See, *e.g.*, J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-182 (1892 ed.); J. Braithwaite & P. Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 148 (1990); H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 9, 25 (1968); A. Sadurski, GIVING DESERT ITS DUE 237-238 (1985); A. Von Hirsch, DOING JUSTICE 66 (1976); Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 727 (1983); Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 221 (1954).

grave end of the spectrum. *Harmelin*, 111 S. Ct. at 2705 (opinion of Kennedy, J.) (citation omitted). More generally, misconduct involving injury to individuals or destruction of property, threats to health or safety, public corruption, injury to a large number of persons or oppression of especially vulnerable victims, or criminal activities of any kind warrants more serious punishment than run-of-the-mill economic torts.[7]

In judging the gravity of misconduct, the degree of the defendant's culpability also is crucial. Cf. *Haslip*, 111 S. Ct. at 1045. Where the defendant is a corporation or other organization, its level or extent of culpability depends upon the nature of its complicity in the wrongful conduct. If the conduct was undertaken pursuant to corporate policy or was approved by high-ranking officers, a relatively greater sanction would be justified, both because the corporation could in such a case fairly be said to be more culpable and because higher-level corporate actors have the capacity to commit greater wrongs in the name of the corporation. If, on the other hand, the misconduct is the act of lower-level employees, the organization's culpability, and the appropriate sanction, would be less. See generally FEDERAL SENTENCING GUIDELINES § 8C2.5(b); MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962); Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991). Similarly, where the defendant is an organization whose members or owners consist principally of persons wholly innocent of the alleged wrongdoing, courts should be sensitive to the unfairness of imposing an excessively large punishment upon blameless individuals. See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Indeed, this consideration suggests that deterrence, rather than retribution, is the

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[7] See *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991), cert. denied, 590 A.2d 158 (Md. 1991); *The Post Office* v. *Portec, Inc.*, 913 F.2d 802, 810 (10th Cir. 1990), vacated on other grounds, 111 S. Ct. 1299 (1991), vacated and appeal dismissed on other grounds, 935 F.2d 1105 (10th Cir. 1991); *Machine Maintenance & Equip. Co.* v. *Cooper Indus.*, 661 F. Supp. 1112 (E.D. Mo. 1987); *Mutual Life Ins. Co.* v. *Estate of Wesson*, 517 So.2d 521 (Miss. 1987), cert. denied, 486 U.S. 1043 (1988).

policy principally served by the punishment of corporate defendants.

2. Injury To The Victim And Gain To The Defendant

a. Just as the character of the defendant's conduct is relevant, so too is the extent of the injury inflicted (or threatened) by that conduct; looking to the magnitude of the injury relates to the judgment that society's interest in deterrence increases as the scope and gravity of the harm increases. *Haslip* thus praised the Alabama system because it appeared to ensure that punitive awards "have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. See *Harmelin*, 111 S. Ct. at 2706 (opinion of Kennedy, J.) (substantial punishment justified when "crime threatened to cause grave harm to society"); *Solem*, 463 U.S. at 293 ("[t]he absolute magnitude of the [harm involved] may be relevant").[8] Indeed, the Court concluded its opinion in *Haslip* with the observation that the punitive award there, which was only some four times the amount of the compensatory damages, "may be close to the line" of "constitutional impropriety." 111 S. Ct. at 1046.

This conclusion reflects the general sense that a punitive award should not be orders of magnitude larger than the associated compensatory damages. When establishing punitive civil penalties, for example, legislatures traditionally have awarded no more than treble damages (as Congress did, for example, under the antitrust laws, RICO, and the Lanham Act). And commentators have suggested that punitive damages be considered presumptively excessive if more than three times the compensatory judgment.[9] A much

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[8] Many of the Court's decisions addressing the consistency of civil penalties with the requirements of substantive due process have referred to the size of the actual damages. Compare, *e.g.*, *Life & Casualty Ins. Co.* v. *McCray*, 291 U.S. 566, 573 (1934) (sustaining penalty for wrongfully withholding payment because the penalty amount bore a "reasonable proportion" to the possible actual damages), with *Tucker*, 230 U.S. at 351 (penalty invalid because "grossly out of proportion to the possible actual damages").

[9] See, *e.g.*, American College of Trial Lawyers, REPORT ON PUNITIVE DAMAGES 15 (1989); ABA Special Comm. on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-10 to 6-12 (1986).

higher ratio of punitive to actual damages accordingly is a clear warning sign that the punitive award may be excessive and must receive close scrutiny.

This proposition is not in the least incompatible with the Court's indication in *Haslip* that the relationship between compensatory and punitive damages does not provide "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S. Ct. at 1043. Deterrence, after all, often may be substantially achieved by the payment of compensatory damages alone. See *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 312-313 (1986) ("Deterrence * * * operates through the mechanism of damages that are *compensatory*" and 42 U.S.C. 1983 "presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations"); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1003, 1060 (1981); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931). That is particularly so where the compensatory payment is not disgorgement of gain from the tort (because there was no gain) but instead represents pure loss to the defendant. Whether the required payment in such circumstances is labelled compensatory or punitive, it has a similar impact on the defendant and therefore a similar deterrent effect. In such circumstances, large compensatory damages, far from justifying an increased punitive award, would actually render substantial additional penalties less rational. See, *e.g.*, *Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 810 (Utah 1991).

On the other hand, where the injury is slight or only nominal, basing the penalty on the amount of compensatory damages is likely to be inadequate to provide appropriate punishment and deterrence. The Court recognized as much in *St. Louis, I.M. & S. Ry.* v. *Williams*, *supra*. There the penalty imposed pursuant to statute ($75 for a $.66 overcharge) was held not to be excessive because no individual passenger would have an incentive to sue for such

minimal actual damages (the case was decided before the advent of class actions) and because the railroad could wrongfully obtain substantial profit from "the numberless opportunities for committing the offense." 251 U.S. at 67. See also *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907).

In the typical case, however, the size of the compensatory award, while not necessarily determinative of the question whether the punitive judgment offends the Due Process Clause, is highly relevant. Although we believe there is much merit to the suggestion that punitive damages be considered presumptively excessive if greater than a prescribed multiple of the amount of compensatory damages, we acknowledge that a punitive award should neither be conclusively unconstitutional simply because it is more than three (or so) times the compensatory award nor conclusively constitutional because it is less than a trebled compensatory award. Arbitrariness and irrationality can be rooted out of the present punitive damages system only if the Court establishes a due process standard that eschews fixed formulas and instead requires a case-specific analysis of the rationality of the jury's verdict.

b. The flip side of injury to the victim is gain to the defendant; the greater the anticipated gain from a tort, the greater the penalty needed to provide appropriate disincentives for its commission. Cf. *Haslip*, 111 S. Ct. at 1045 (noting that Alabama courts consider "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss"). And again, the punishment inflicted by a punitive damages verdict may be so far out of line with the amount that the defendant gained or reasonably could have expected to gain from its misconduct as to suggest irrationality. See *United States* v. *Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987); Dobbs, *Ending Punishment in "Punitive Damages": Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 874-875 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1319 (1976). In such circumstances, it would be impossible to justify the amount of punitive damages as necessary or appropriate to achieve an adequate level of deterrence. See Bentham, at 179-181; Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1179 & n.69 (1989).

3. The Relevance Of Wealth

In contrast, it should be emphasized that one factor stressed to the jury in this case (see Pet. App. 40a-42a) and relied upon by the court below (see *id.* at 36a-37a, 39a) should be viewed with great skepticism when made part of the punitive damages equation: the net worth and size of the defendant. The importance of confining the role of "wealth" in the punishment calculus was twice suggested by the Court in *Haslip*. In upholding the instructions given in that case as not unconstitutionally vague, the Court stressed that "[a]ny evidence of [the defendant's] wealth was excluded from the trial in accord with Alabama law." 111 S. Ct. at 1044. And the Court reemphasized the point when it expressed approval of the post-verdict judicial review conducted by the Alabama courts, which gives only a limited role to the defendant's wealth: "While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

There is, of course, a strong historical basis for considering poor financial condition as a *mitigating* factor in setting monetary punishments.[10] And wealth may justify enhancing punitive damages for *individuals*, especially when they commit torts or crimes that do not have a purely economic motivation. In such cases, rational deterrence requires "monetarizing" the value to the

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[10] The roots of this practice may be traced back to the Magna Carta, which had as one of its central purposes the regulation of civil fines, known as amercements, imposed by the early English courts. See *Browning-Ferris*, 492 U.S. at 269-271. The Magna Carta required proportionality in punishments, guaranteeing that a person should "not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense." Magna Carta, ch. 20, reprinted in W. McKechnie, *Magna Carta* 284 (2d ed. 1914). But it also provided that even in cases of "grave offenses" the amount must "yet sav[e] always" the wrongdoer's means of livelihood to sustain himself and his family. *Ibid.* See *Browning-Ferris*, 492 U.S. at 271.

individual of the misconduct. See *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61 (1982); Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 65 (1990). See generally 1 Ghiardi & Kircher, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.36 (1981 & 1990 Supp.) (citing cases).

It does not follow, however, that the defendant's wealth or size is always a legitimate factor in setting punishment. To the contrary, scholarly opinion on the subject is virtually unanimous in the view that the link between wealth and deterrence breaks down when applied to large, publicly held corporations. As stated by a group of prominent legal scholars serving as reporters for the ALI's study of possible revisions of the Restatement of Torts:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question. * * *
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.

II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, at 254-255.

There are several reasons why financial condition is of little relevance to rational punishment of large, publicly held corporations -- or, for that matter, of labor unions, religious organizations, or other institutional entities. A publicly held institution is "not wealthy in the sense that persons are" (*Zazu*, 979 F.2d at 508); rather, it is a collection of shareholders (often pension funds investing on behalf of individual retirees) and employees whose personal wealth has little relation to the aggregate size of the corporation. At the same time, because corporate torts customarily are motivated by the desire for economic gain, punishment should be sufficient if it removes the prospect of gain from wrongful behavior. And the overall size of a business has little bearing on the way its employees behave; because there is little or no

difference in the motivation of large and small corporations to increase the company's profits, a profit-removing punishment should be equally effective regardless of the company's size. As Judge Easterbrook wrote for the Seventh Circuit, "General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none." *Id.* at 509. See generally Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. CAL. L. REV. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler).[11]

Having said that, we do not mean to suggest that the Due Process Clause is "an economic primer on what factors best further the goals of punishment and deterrence" (*Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part)) or that the States should not be recognized to possess considerable leeway in determining how to accomplish their purposes. We therefore urge no blanket constitutional rule precluding any consideration of a corporate defendant's financial condition in the punishment calculus, though we think that the case for adopting such a rule as a matter of sound policy is overwhelming. But rationality remains the constitutional touchstone, and the defendant's wealth provides at best a weak reed on which to support a materially enhanced damage award. At some point, a punishment that rests primarily on such a reed loses any rational relationship to the purposes of retribution and deterrence that support the exaction of punishment; the penalty ceases to "fit the crime," but instead punishes a large entity simply for its status -- "as if having a large

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[11] The United States Sentencing Commission, after studying the subject for several years, recently promulgated guidelines for sentencing organizations convicted of committing federal crimes. Those guidelines assign corporate financial condition no role in setting punishment.

net worth were the wrong to be deterred!" *Zazu*, 979 F.2d at 508. See *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451 (1920); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273-274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Cf. *Robinson* v. *California*, 370 U.S. 660 (1962). In such a case the punitive award is nothing more than a transfer of wealth from a large (and typically impersonal) defendant to a sympathetic (usually local) plaintiff. Cf. *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring in the judgment). "[T]aking the property of one and bestowing it on another" in that fashion is inconsistent with the Due Process Clause. *Alton*, 295 U.S. at 350.

4. The Deference Due The Jury's Verdict

a. One additional consideration should be borne in mind when assessing a jury's award of punitive damages. In reviewing the rationality of state action under the Due Process and Equal Protection Clauses, and in evaluating challenges to punishment under the Eighth Amendment, the Court is accustomed to giving the greatest deference to legislative judgments. The Court has recognized that setting aside such judgments "requires rejection [of] the collective wisdom of the [state] Legislature and, as a consequence, the [State's] citizenry," something that is appropriate "only in the most extreme circumstance." *Harmelin*, 111 S. Ct. at 2708 (opinion of Kennedy, J.). In contrast, the judgment of an individual jury -- typically reviewed by a trial judge under a highly deferential standard (see note 4, *supra*) -- stands on an entirely different footing.

A legislature's decision to authorize the imposition of a particular sanction for a particular type of misconduct reflects a finding -- either explicit or implicit -- that there is a reasonable relationship between the sanction and the misconduct. A legislature has the ability to gather relevant facts, ascertain and express the values of the community, and devise a proportional system of sanctions by considering each offense as part of the broader universe of wrongful conduct and fixing the proper relationship between various categories of offenses. A legislature also is in a position to act for the State in answering the "difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order." *Harmelin*, 111 S. Ct.

at 2703 (opinion of Kennedy, J.). As a consequence, issues relating to "severity of punishment * * * are peculiarly questions of legislative policy" (*Gore* v. *United States*, 357 U.S. 386, 393 (1958)), and the legislature's determinations in this area command "'substantial deference.'" *Harmelin*, 111 S. Ct. at 2703-2704 (opinion of Kennedy, J.), quoting *Solem*, 463 U.S. at 290.

Such deference is appropriate, however, only when the legislature has in fact authorized the sanction under review. As Justice Brennan observed in *Browning-Ferris*, "scrutiny of awards made without benefit of a legislature's deliberation and guidance [should] be less indulgent than * * * consideration of those that fall within statutory limits." 492 U.S. at 281 (concurring opinion).

Yet that is precisely the situation of a jury that hears only a single punitive damages case. Such a jury considers its case in isolation and in retrospect. Unlike a legislature, a jury lacks the information and expertise needed to place the particular defendant's actions in context and has no knowledge of the scale of punishments to which other wrongdoers are subjected. An unguided jury is therefore much less likely than a legislature to be able to devise a punishment that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. Indeed, the jury is far less able even than the "single jurist" whose judgment was set aside in *Solem* (see *Harmelin*, 111 S. Ct. at 2708 (opinion of Kennedy, J.)) to make determinations about appropriate punishment, for jurors have no experience in meting out judicial punishments and no sense of how other defendants typically are punished for similar misconduct. Courts accordingly should give little deference to the jury's determination when it is not situated "within a range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring).

b. The preceding discussion points up a useful frame of reference in assessing the rationality of a punishment determined by a jury: the sanctions set forth in relevant criminal and civil penalty statutes. For the reasons just discussed, the legislature's judgment in setting criminal fines and civil penalties -- which, like punitive damages, are designed to further the goals of punishment and

deterrence[12] -- is presumptively reasonable. Those punishments therefore furnish a powerful objective standard for a court to use in analyzing the reasonableness of a punitive damages award.

We do not suggest that juries generally should be constrained dollar-for-dollar by the analogous legislative penalty; *Haslip* made that much clear. See 111 S. Ct. at 1046. There are sensible reasons why a punitive damages verdict might rationally exceed that penalty: for one, the statutory sanction might have been set many years before and not brought into line with contemporary circumstances; for another, the tort plaintiff's role as private attorney general might justify a higher award than is appropriate when the State itself brings suit. Surely, however, if the punishment meted out by a jury vastly exceeds the penalty range established by the legislature in analogous areas, that is a telling sign that the award is disproportionate.

At the same time, such comparisons are more probative in the area of punitive damages than they are under the Eighth Amendment -- where they continue to have a substantial role. See *Harmelin*, 111 S. Ct. at 2707 (opinion of Kennedy, J.); *Solem*, 463 U.S. at 291-292; *Weems*, 217 U.S. at 380-381. In the Eighth Amendment setting, disparities in the sentencing schemes of the States "are the inevitable, often beneficial, result of the federal structure" (*Harmelin*, 111 S. Ct. at 2704 (opinion of Kennedy, J.)); that fact reduces the value of inter-jurisdictional comparisons. By contrast, the penalties set by the legislature of a State provide a useful benchmark (indeed, the single most objective benchmark) to employ in judging awards returned by juries *in that State*.

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[12] Two other goals of the criminal law, incapacitation and rehabilitation (see *Harmelin*, 111 S. Ct. at 2704 (opinion of Kennedy, J.)), have no application to corporate defendants.

C. THE PUNITIVE DAMAGES IMPOSED IN THIS CASE ARE EXCESSIVE

Application of these principles to the punitive damages in this case makes clear that the verdict was so excessive as to be unconstitutional. As a preliminary matter, the jury's determination of the size of the punishment is not entitled to substantial deference. The amount of the judgment was not chosen from a legislatively prescribed spectrum of permissible penalties for the kind of wrong TXO was found to have committed. Because the punitive damages award thus represents the view only of a single jury, with no experience of any kind in selecting punishments, and exercising unlimited and basically unguided discretion regarding the appropriate sanction, highly deferential review is not appropriate. With that in mind, an examination of the relevant factors establishes that the judgment here is insupportable.

First, TXO's conduct hardly constituted a grave offense. The tort here involved no violence, no injury to individuals or destruction of property, no threat to the public health or safety, no public corruption, no injury to a large number of persons or oppression of the especially vulnerable. Indeed, it involved no criminal conduct of any kind, which suggests that society does not view it as deserving special opprobrium. Cf. *Younger* v. *Harris*, 401 U.S. 37, 55 n.2 (1971) (Stewart J., concurring). In fact, it was not even clear that TXO's conduct was tortious at the time it was undertaken; the conduct ultimately was held to constitute an obscure civil wrong, slander of title, that had not been recognized in West Virginia until the decision by the state supreme court *in this case*. See Pet. App. 13a ("there is no West Virginia case on record directly recognizing an action for slander of title"). TXO's actions therefore barely register on the reprehensibility scale.[13]

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[13] The court below suggested that TXO had engaged in a "pattern and practice of fraud, trickery and deceit." Pet. App. 40a. The evidence of this "pattern" consisted of the testimony of four lawyers who had brought suits against TXO in other fora. *Id.* at 21a-24a. Of the suits that were the subject of this testimony, three appear to have settled (see *id.* at 22a-24a); only one was resolved on the merits -- and in that case the jury found *for TXO*. See *id.* at 24a. It is manifest that West Virginia should

Second, TXO obtained no gain from its actions. It did not obtain the favorable royalty agreement that purportedly was the goal of its scheme. To the contrary, the $19,000 compensatory judgment -- which represented respondents' legal expenses -- was not the disgorgement of wrongful profits but pure loss to TXO.

Third, the harm inflicted by TXO's conduct was minimal. Respondents suffered no out-of-pocket loss at all in the usual sense of that term; the attorney's fees that were the subject of the compensatory award are, as the court below acknowledged, "[o]rdinarily * * * not considered damages." Pet. App. 20. Yet while the compensatory judgment awarding attorney's fees was not trivial, the punitive award exceeded that judgment by a factor or more than *500*. This is, then, not a case in which the punitive award has "some understandable relationship to compensatory damages" (*Haslip*, 111 S. Ct. at 1045) or is supported by "objective criteria" of reasonableness. *Id.* at 1046. If the four-to-one ratio of punitive to compensatory awards in *Haslip* was "close to the line" of constitutional impropriety (*ibid.*), the 526-to-one award here is off the court and into the stadium parking lot.

The court below ran through a set of remarkable verbal gymnastics in its attempt nevertheless to justify this extraordinary ratio of punitive to compensatory damages. It acknowledged that the Due Process Clause generally precludes punishments that exceed the compensatory judgment by a ratio of more than five-to-one in the cases of "really stupid defendants" (Pet. App. 37a-38a), by which the court evidently meant defendants who engaged in what is conventionally termed reckless or grossly negligent conduct. See *id.* at 53a-54a (McHugh, C.J., concurring). But for what the court termed "really mean defendants" (that is, those who have acted knowingly), it declared that the sky is the limit; punitive damages against such defendants, the court concluded, may be returned at a ratio of 500-to-one -- or, evidently, in any amount at all. See *id.* at 36a, 39a. The court defended this disparity in the treatment accorded "really stupid" and "really mean" defendants on grounds

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not punish TXO for conduct in other States that has been fully resolved (through the medium of settlement) or that was found not to have been wrongful at all.

of deterrence rather than of culpability, explaining that "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant." *Id.* at 39a. The court added that "[t]he appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention." *Ibid.*

This analysis, however, is manifestly irrational. The theory that underlies the award of punitive damages for purposes of deterrence is that a potential wrongdoer will refrain from wrongdoing (either intentional wrongdoing or a refusal to take precautions that would prevent injury from reckless conduct) when the benefits derived from the wrongdoing are outweighed by the likely penalty (discounted by the possibility of escaping punishment). Assuming that both "mean" and "stupid" defendants act rationally -- and the court below offered no reason to suppose that a coherent regime of punishment could be constructed on some other foundation -- no larger sum is needed to deter one than the other. While differences in levels of *culpability* might justify greater retribution for "mean" than for "stupid" defendants, that was not the rationale offered by the court below for its affirmance of the award here. And needless to say, an arbitrary award should not be upheld because a reviewing court was able to articulate an irrational basis on which to justify it.[14]

Fourth, other telltale signs of a disproportionate punishment are present here. The jury was exposed to, and was told by the trial judge that it could consider, the corporate defendant's net worth. See Pet. App. 40a-42a; R. 73 (jury instructions telling jurors they could consider "the wealth of the perpetrator"). Given

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[14] The court below suggested that the type of action undertaken by TXO in this case "could potentially cause millions of dollars in damages to other victims." Pet. App. 40a. This conclusory assertion is without support in the record. It also is logically insupportable. If TXO's quitclaim deed was indeed frivolous, TXO never could have succeeded in "steal[ing] [respondents'] land" (*id.* at 20a) and respondents (or others in their position) could have cleared their title with a minimum of expense, as in fact happened in this case. And, of course, if the deed was not frivolous punishment is not justified at all.

the urgings of respondents' counsel and the size of the verdict,[15] it is almost certain that respondents "enjoy[ed] a windfall because they ha[d] the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.[16] At the same time, the award is grossly disproportionate to the statutory penalties in West Virginia and other jurisdictions for *more serious misconduct* than that engaged in by TXO.[17]

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[15] As is typical in cases like this one, respondents' trial counsel emphasized TXO's net worth in his argument to the jury. Among other things, he stated: "This is a multi-million dollar corporation -- even a billion dollars in assets. When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again? It's going to take a lot more than awarding those attorney's fees. It's gonna take a lot more than that. This corporation, a multi-million dollar corporation, ought to be fined in terms of what they understand that goes to their resources and their resources are in the millions." R. 758.

[16] For its part, the court below was of the view that a corporate defendant's *size* may justify a larger punitive award, at least when the defendant is "really stupid." The court explained that "one of the reasons we allow punitive damages in these 'stupid' cases is to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." Pet. App. 36a. While this analysis evidently had no bearing here because the court characterized TXO as "really mean," it is worth noting how nonsensical the court's approach is. Its rationale went as follows: "The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)" *Id.* at 37a. The court went on to conclude that a higher punitive award would "increase the likelihood that settlement decisions will be made by upper management employees." *Id.* at 38a. The court thus appears to have reasoned that enormous damages are justified against large defendants because middle managers can be counted on to act contrary to their employers' interests by fomenting (and then refusing to settle) litigation against those employers. This is hardly a rational ground on which to justify awards against large corporations that would be held unconstitutional against small ones.

[17] The West Virginia criminal offense most similar to the conduct

In sum, the gravity of the wrong was not great. It produced no gain for the defendant and only minimal harm to the plaintiffs. No other extraordinary factors justify substantial punishment. In these circumstances, the punitive award must be set aside as constitutionally excessive.

D. INTERVENTION BY THIS COURT IS ESSENTIAL

Having said all this, and notwithstanding the force of the arguments favoring the application of substantive due process here, we recognize that there is a natural judicial reluctance to announce substantive constitutional limits on punitive exactions. The appropriate lines, after all, concededly are difficult to draw with precision, for the governing standard is disturbingly imprecise. And perhaps more significant, the Court has never in the past found it necessary to grapple with the issue directly. That may leave the Court with a question posed by Justice Scalia during the argument in *Haslip*: why, given that punitive damages have been awarded for 200 years, is judicial intervention in the punitive damages area necessary now?

The answer, in our view, is that the truly enormous and irrational punitive award is a problem that is entirely a product of this

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engaged in by TXO involves making a false statement of the "financial condition" of the speaker or "any other person, firm, or corporation"; that offense is a misdemeanor punishable by a maximum fine of $500, although imprisonment also is possible for an individual defendant. W. Va. Code Ann. § 61-3-23 (Michie 1992). Larceny and theft of money or services by false pretenses likewise is subject to a maximum fine of $500. W. Va. Stat. Ann. §§ 61-3-13, 61-3-24. The highest criminal fine available in the State appears to be $10,000 for computer fraud. W. Va. Stat. Ann. § 61-3C-4. The highest penalties authorized by other States for embezzlement, larceny, and theft generally range from $10,000 to $100,000, with some States providing an alternative fine of two or three times the defendant's gain. Only Arizona authorizes higher monetary sanctions -- fines of up to $150,000 for individuals (see Ariz. Rev. Stat. § 13-801) and $1 million for corporations (see Ariz. Rev. Stat. § 13-803). But these maxima, which are fixed by general sentencing provisions applicable to a wide variety of offenses, reflect the legislature's judgment regarding the appropriate sanction for the most severe felonies. They accordingly provide no support whatever for the result here.

generation. We have reviewed punitive awards returned during the first 150 years of the nation's history;[18] with the exception of cases involving wrongful death, the largest punitive award that we uncovered in an extensive study of reported 19th century decisions -- including punitive awards that were set aside as excessive -- was $4500.[19] This sum, worth approximately $58,000 in 1987 dollars, is strikingly small by present-day standards. Most reported 19th century punitive awards, even those involving serious injuries, were much smaller.

The size of punitive exactions remained modest during the first half of this century. Writing in 1930, Dean McCormick noted what he described as several "startlingly large verdicts of punitive damages": one for $50,000, one for $33,333.33 (reduced to $10,000), and one for $12,650 (reduced by $5000).[20] While these sums certainly were significant amounts of money at the time -- the largest, which included compensatory damages for libel, was worth some $332,000 in 1987 dollars -- they would pass virtually unnoticed today. Twenty-five years after Dean McCormick's article, in 1955, the largest punitive damages verdict in California history and one of the two largest in the history of the United States still was only $75,000. See Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, INS. L.J., May 1980, at 257, 259 (1980).

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[18] Much of the research summarized here was presented to the Court in detail in the brief for The American National Red Cross, *et al.*, as *amici curiae*, in *Browning-Ferris*, No. 88-556.

[19] *New Orleans, J. & Great N.R.R.* v. *Hurst*, 36 Miss. 660 (1859). Indeed, so far as we have been able to determine, the largest 19th century judgment in which punitive and compensatory damages were *combined* was $20,000. *Caldwell* v. *New Jersey Steamboat Co.*, 47 N.Y. 282-283 (1872) (plaintiff passenger was "maimed and crippled for life" by an exploding steamboat boiler). Because that award (and others of similar magnitude) involved a serious injury, the compensatory portion presumably was large.

[20] McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. Rev. 129, 149 & n.114 (1930), citing *Duncan* v. *Record Publishing Co.*, 143 S.E. 31 (S.C. 1927); *Livesley* v. *Stock*, 281 P. 70 (Cal. 1929); *Seaman* v. *Dexter*, 114 A. 75 (Conn. 1921).

Indeed, as recently as 1976, as Justice O'Connor noted in *Browning-Ferris*, the largest punitive damages judgment affirmed by an appellate court in a products liability case was $250,000; since then, awards more than 30 times as high have been sustained on appeal. See 492 U.S. at 282 (concurring and dissenting opinion). The award here is 40 times as high -- and is more than two full orders of magnitude larger than the largest award returned a single generation ago.

The Court must address the issue, moreover, because state legislation has not proved to be a uniformly effective answer to the problem of excessive punishments. While a number of States have enacted useful reforms of the punitive damages process, others have not acted -- and in some States punitive damages reform legislation has itself been struck down as inconsistent with state constitutional provisions.[21] The problem that confronts the Court, in any event, is not one that lends itself to correction by the States. The difficulty here is not so much that punitive damages are being awarded in increasing numbers of cases (although they are, see *Haslip*, 111 U.S. at 1066 (O'Connor, J., dissenting)); the problem is that astonishing awards are being returned against a relatively small number of defendants. And as the West Virginia Supreme Court itself has noted, the cases presenting such awards typically pit local plaintiffs against "out-of-state (often faceless, publicly held) corporations." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W. Va. 1991). This is not a problem that is likely to obtain a sympathetic hearing from state legislatures. Defendants, meanwhile, are being denied their federal rights as juries return arbitrary and irrational punitive awards.

As for the problem of line-drawing, that concededly is difficult to do with any great precision. Indeed, at the margins it may be impossible to articulate why an award of one amount is appropriate

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[21] See, *e.g.*, *Armstrong* v. *Roger's Outdoor Sports, Inc.*, *supra*; *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Kirk* v. *Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991). See generally 2 Ghiardi & Kircher, *supra*, § 21.16 at 83 ("[t]he majority of courts that have considered caps for noneconomic loss have held them to be unconstitutional").

and a slightly larger one is not. Cf. *Solem*, 463 U.S. at 294. But that does not justify judicial inaction in the face of arbitrary and irrational punishments, just as similar line-drawing problems have not led the Court to withhold relief when irrational laws are challenged under the Equal Protection Clause or when grossly excessive punishments are attacked under the Eighth Amendment. And however difficult the question at the margins, judges surely are competent to determine when punitive awards are orders of magnitude larger than "reasonably necessary to punish and deter." This case demands such a determination.

CONCLUSION

The judgment of the West Virginia Supreme Court should be reversed.

Respectfully submitted.

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